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Supreme Court, U.S.
FILED

96 908 AUG 28 1996

No. OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

FORT STEWART ASSOCIATION OF EDUCATORS,

Petitioner,

vs.

JOSEPH A. WESTON and
THE FORT STEWART DEPENDENTS SCHOOLS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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34 pp

QUESTION PRESENTED

I. Whether the comprehensive nature of the Civil Service Reform Act deprives a District Court of subject matter jurisdiction in an action to determine the statutory rights of employees who are employed without regard to the civil service personnel system?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgement is sought to be reviewed here appear in the caption of the case. There is not parent or subsidiary company of any party to be listed.

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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

FORT STEWART ASSOCIATION OF EDUCATORS,

Petitioner,

vs.

WESTON AND THE FORT STEWART DEPENDENTS SCHOOLS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Fort Stewart Association of Educators, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unreported decisions of the Court of Appeals and the District Court are reproduced in the Appendix filed herewith (App.) at 1a and 3a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on May 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provision of Title VII of the Civil Service Reform Act of 1978, as amended, 5 U.S.C. §§ 7101 *et seq.* (Chapter 71 of Title 5) is set forth below:

§ 7121. Grievance procedures

* * * *

(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section

7701 of this title or under the negotiated grievance procedure, but not both. ***Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both.***

The pertinent provision of 20 U.S.C. § 241,[1] as amended, is set forth below:

> § 241. Necessary arrangements by Secretary; standard of education
> (a) In the case of children who reside on Federal property-
>
> * * * *
>
> (2) if it is the judgement of the Secretary, after consultation with the appropriate State educational agency, that no local education agency is able to provide suitable free public education for such

[1] 20 U.S.C. § 241 has since been repealed and replaced by Section 331 of Public Law 103-382, 108 Stat. 3665, which created 10 U.S.C. § 2164.

> children, the Secretary shall make such arrangements . . . as may be necessary to provide free public education for such children. . . . For the purpose of providing such comparable education, personnel may be employed and the compensation, tenure leave, hours of work, and other incidents of employment relationship may be fixed without regard to the Civil Service Act and rules and the following: (1) chapter 51 and subchapter III of chapter 53 of Title 5; (2) subchapter I of chapter 63 of Title 5; (3) sections 5504, 5541 to 5549, and 6161 of Title 5; (4) sections 1302(b), (c), 2108, 3305(b), 3306(a)(2), 3308 to 3318, 3319(b), 3320, 3351, 3363, 3364, 3501 to 3504, 7511, 7412, and 7701 of Title 5; and (5) chapter 43 of Title 5.

STATEMENT OF THE CASE

The Fort Stewart Association of Educators (FSAE) is the exclusive representative of the professional and non-professional employees of the Fort Stewart Dependents Schools, Department of Defense Domestic Dependent Elementary and

Secondary Schools (FSDS).[2] FSAE was certified as the exclusive representative of this bargaining unit on December 12, 1983, by the Federal Labor Relations Authority (Case No. 4 RO-40002). At all times since certification, FSAE has been the exclusive representative of the bargaining unit members at the FSDS.

Pursuant to Chapter 71 of Title 5, United States Code, FSDS and FSAE entered into a series of collective bargaining agreements. The current collective bargaining agreement was entered into on May 30, 1991, and became binding on the parties on June 29, 1991. On June 29, 1994, the collective bargaining agreement was renewed for one year. As required by 5 U.S.C. §§ 7121(a)(1) and (b)(3)(C) the parties' collective bargaining agreement contained a procedure for the settlement of grievances and the right to arbitrable review of any unsettled grievances.

On August 25, 1993, Ms. Judy Johnson, art teacher and member of the FSAE bargaining unit, was removed from her teaching responsibilities and

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[2] FSDS consists of two elementary schools operated by the Department of Defense aboard the Fort Stewart Army Installation, Fort Stewart, Georgia.

reassigned. Shortly thereafter, on September 27, 1993, FSDS issued Ms. Johnson a written memorandum which terminated her employment, for cause, effective September 29, 1993. FSAE filed Association Grievances on behalf of Ms. Johnson as to both of these personnel actions. When the grievances were not resolved through the grievance procedure, FSAE timely invoked the arbitration provision of the parties' collective bargaining agreement. The grievances were heard by Arbitrator Joseph A. Weston, the arbitrator jointly selected by FSDS and the FSAE.

A hearing was held over the two grievances on June 13 and 14, 1994. Thereafter, Arbitrator Weston, on August 8, 1994, issued an opinion and award which held that Federal law precluded him from adjudicating the merits of the grievances. Rather, Arbitrator Weston erroneously determined that the Civil Service Reform Act, Pub. L. 95-454, 92 Stat. 1111 *et seq.* (codified throughout various sections of 5 U.S.C.), as applied by this Court in United States v. Fausto, 484 U.S. 439 (1988), precluded petitioner's bargaining unit members from arbitrating adverse personnel actions.

Citing 5 U.S.C. § 7121(e)(1), FSDS argued before the arbitrator that

employees hired pursuant to 20 U.S.C. § 241 were non-preference eligible excepted service (NEES) employees without appeal rights to the Merit Systems Protection Board and therefore without a right to arbitrable review of adverse actions through the negotiated grievance procedure. FSDS further argued that these employees were not in an "other personnel system" as the term is used in 5 U.S.C. § 7121(e) and (f) and, therefore, without a right to arbitrable review of adverse actions under the second sentence of 5 U.S.C. § 7121(e)(1). Arbitrator Weston held that "[b]ecause of her status [Ms. Johnson] is not entitled by law to have her grievances be subjected to arbitrable review under the provisions of the negotiated grievance procedure in the collective bargaining agreement."

Following the arbitrator's refusal to issue a decision on the merits, FSAE filed the instant judicial action in the United States District Court for the Southern District of Georgia. FSAE sought a decision in the form of a declaration that employees hired pursuant to 20 U.S.C. § 241 are in an "other personnel system" as the terms is used in 5 U.S.C. § 7121(e) and (f). FSAE also requested a declaration that the parties collective bargaining agreement which

provided for arbitrable review of adverse actions was binding on FSDS. Finally, FSAE requested mandamus relief pursuant to 28 U.S.C.§ 1361 asking the district court to order FSDS to abide by the terms and conditions of the collective bargaining agreement.[3]

On January 20, 1995, the FSDS filed a Motion to Dismiss on the basis that the district court lacked subject matter jurisdiction over the complaint. Following responsive pleading and without a hearing, the district court granted the motion to dismiss on February 24, 1995.

Relying on a misunderstanding of the nature of petitioner's judicial action, the District Court also applied the Fausto decision and held that it lacked subject matter jurisdiction over the claim. In the order granting FSDS' motion, the district court stated that "[i]f Johnson was a NEES employee

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[3] FSAE had also asked for mandamus relief asking the Court to order the arbitrator to issue a decision on the merits of the underlying grievances. As was pointed out in the government's opposition brief below, mandamus can only lie against a government employee which the arbitrator is not.

employed pursuant to an other personnel system, then she may have been entitled to arbitration but she has no statutory right under the CSRA to judicial review of that decision." (App. 8a). Herein lies the crux of this petition. The district court misunderstood the nature of the complaint by assuming that FSAE was seeking review of an arbitrator's decision. After reviewing the appeal procedures outlined in 5 U.S.C. § 7121(f) for review of arbitrator decisions, the Court held that no right to review existed.

FSAE, however, was not seeking judicial review of the arbitrator's opinion and award. The arbitrator did not issue a decision on the merits of the grievance for which review might be sought. FSAE instead sought a determination and a declaration from the district court that employees hired pursuant to 20 U.S.C. § 241 are in an "other personnel system" and the terms of the collective bargaining agreement -- which expressly includes the right to arbitrable review of adverse actions -- are binding on the parties. FSAE also sought mandamus relief from the district court in the form of an order to FSDS to abide by the terms and conditions of the collective bargaining agreement that it signed.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court without opinion. (App. 3a).

REASONS FOR GRANTING THE WRIT

The Court should grant the writ in order to clarify the earlier ruling in United States v. Fausto, 484 U.S. 439 (1988). The opinion in Fausto states that Federal civil service employees whose employment is governed by the Civil Service Reform Act (CSRA) may not seek and obtain judicial review of adverse personnel actions above and beyond the review which Congress chose to provide within the CSRA. Clarification is needed, however, because the lower Federal Courts (and many federal agencies, acting as employers) have read the Fausto decision as holding that any and all Federal employees, whether covered by the civil service personnel system or not, are precluded from obtaining third party review of their employment claims unless the CSRA expressly provides for such review.

Additionally, this Court should grant the writ because Federal District Courts should know that, unless subject matter jurisdiction is clearly precluded, they have judicial power to interpret

Federal statutes and inform disputing parties of their respective rights under the statute(s). In the instant case, petitioner was possessed of a non-lawyer arbitrator erroneously performing the quintessential judicial function of statutory construction. To compound the situation, none of the administrative adjudicative agencies which implement third party review procedures within the CSRA have jurisdiction to address adverse personnel actions involving "other personnel systems". See 5 U.S.C. § 7121(f). Therefore, petitioner properly took its legal claim of a statutory entitlement to Federal court. Because review is not otherwise precluded, the District Court below possessed subject matter jurisdiction to hear and adjudicate that claim.

Finally, Petitioner's judicial complaint below is not inconsistent with this Court's decision in Fausto. That decision held that the comprehensive civil service personnel system contained within the CSRA, which does not provide judicial review of adverse personnel actions to a category of federal employees covered by the CSRA personnel system, provided regular civil service employees with all of their rights to third party review. Petitioner does not seek to challenge or alter the Court's

holding in Fausto. Rather, it is the position of the FSAE that Fausto is simply not applicable to the case at hand. The case at hand involves the statutory rights of employees not employed pursuant to the civil service personnel system contained in the majority of the CSRA, but instead are employed under a personnel system operating separate and apart from the CSRA personnel system, i.e., an "other personnel system" as that phrase is used in 5 U.S.C. § 7121 (e) and (f). The Writ should be granted because this Court and only this Court can clarify the applicability of the CSRA and the decision in Fausto to employees employed pursuant to a personnel system other than the one contained in the CSRA. This Court should ensure that these employees are not deprived of their statutory rights to arbitral review of adverse actions.

I.

The Holding in Fausto has no Application to Federal Employees Employed in an Other Personnel System and Therefore May Not Properly be Used to Deny Statutory Rights.

In Fausto, this Court examined the comprehensive CSRA personnel system and

concluded that Congress intended to deny judicial review of adverse personnel actions to non-preference eligible excepted service employees because it had not included those employees within the categories of employees who were entitled to such judicial review. At issue, however, were the rights of a civil service employee whose employment was governed by Title 5 of the U.S. Code and the implementing regulations of the Office of Personnel Management. The instant case is legally different because the employees represented by Petitioner are employed

> without regard to the Civil Service Act and rules and the following: (1) chapter 51 and subchapter III of chapter 53 of Title 5; (2) subchapter I of chapter 63 of Title 5; (3) sections 5504, 5541 to 5549, and 6161 of Title 5; (4) sections 1302(b), (c), 2108, 3305(b), 3306(a)(2), 3308 to 3318, 3319(b), 3320, 3351, 3363, 3364, 3501 to 3504, 7511, 7412, and 7701 of Title 5; and (5) chapter 43 of Title 5.

20 U.S.C. § 241(a)(2).

This case is further different from Fausto because petitioner was not seeking judicial review of the merits of the adverse personnel action. In Fausto, the civil service employee was asking the courts to examine the adverse personnel action in order to determine whether it was lawful. This action, by contrast, seeks to have an arbitrator examine the adverse action affecting Ms. Johnson and for him to determine whether the action was permitted by the applicable collective bargaining agreement. In order to effect this ultimate relief, the legal rights of the parties under the applicable statutes need to be judicially determined. Providing such a judicial determination, however, does not constitute judicial review of either the propriety of the underlying adverse action or the arbitrator's decision adjudicating the underlying action.

II.

The Holding in Fausto Did Not Divest District Courts of Their Authority to Address Federal Questions Concerning the Rights of Federal Employees Employed under Other Personnel Systems.

In Fausto, the Court held that when there is an elaborate statutory scheme which provides for judicial review of

adverse personnel actions in certain circumstances, the Court will not assume that additional avenues of judicial review exist. As explained above, however, Petitioner was not seeking judicial review of the underlying adverse personnel action. Rather, Petitioner sought a declaration that employees hired pursuant to 20 U.S.C. § 241 are in an "other personnel system" as the terms is used in 5 U.S.C. §§ 7121(e) and (f). FSAE also requested a declaration that the parties collective bargaining agreement which provided for arbitrable review of adverse actions was binding on FSDS. Further, FSAE requested mandamus relief pursuant to 28 U.S.C.§ 1361, asking the district court to order FSDS to abide by the terms and conditions of the collective bargaining agreement.

The District Court had subject matter jurisdiction over this complaint under 28 U.S.C. § 1331. That statute provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Id. This civil action arose under Chapter 71 of title 5. The plaintiff, FSAE, asked the District Court to find that the terms of the collective

bargaining agreement entered into under authority of Chapter 71 of Title 5, are binding on the respondent.

The District Court also had subject matter jurisdiction under 5 U.S.C. § 702 which provides that "[an association] suffering legal wrong or adversely affected or aggrieved by an agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Petitioner, FSAE, was the exclusive representative of the bargaining unit members employed by the respondent, FSDS, and was a party to a collective bargaining agreement entered into with FSDS. As such, FSAE was adversely affected by the actions of FSDS.

The District Court also had jurisdiction under 28 U.S.C. § 1361. "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Id. FSAE sought an order from the District Court requiring FSDS to comply with the terms contained in their collective bargaining agreement.

III.

As a Matter of Law, Petitioner Is Entitled to the Relief Sought Before the District Court.

Petitioner entered into a collective bargaining agreement with Respondent under the authority of Chapter 71 of Title 5. That chapter requires that "any collective bargaining agreement shall provide procedures for the settlement of grievances . . . ." 5 U.S.C. § 7121(a). In addition, the statute provides that

> any negotiated grievance procedure . . . **shall** . . . provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration....

5 U.S.C. § 7121(b). In compliance with 5 U.S.C. § 7121(a) and (b), the collective bargaining agreement contained an article which established the right to file a grievance and, at the election of FSAE or FSDS, to have that grievance resolved by binding arbitration. As signatory of the collective bargaining agreement, FSDS owed a duty to FSAE to comply with the terms of the collective bargaining agreement.

In addition to the above stated relief, FSAE sought declaratory relief to the effect of a judicial determination that employees employed pursuant to 20 U.S.C. § 241 were in an "other personnel system" as that phrase is used in 5 U.S.C. § 7121. While this type of statutory interpretation would normally evolve from the agency tasked with administering the statute, the Federal Labor Relations Authority (FLRA), they have held that the same statute, 5 U.S.C. § 7121, precludes them from hearing appeals from arbitrator's decisions where the matter before the arbitrator was "similar to those covered under sections 4303 [a performance based adverse action] and 7512 [a 'for cause' based adverse action] of this title which arise under other personnel systems[.]" 5 U.S.C. § 7121(f). Because Ms. Johnson's adverse personnel action was a "for cause" action and Petitioner maintains that they operate under an "other personnel system," appeal to the FLRA was not available.

CONCLUSION

If arbitrators are permitted to refuse to address the merits of a grievance and the District Courts lack subject matter jurisdiction over this type of judicial complaint, Petitioner

and its members will have no means of enforcing their collective bargaining rights provided under Chapter 71 of Title 5, U.S. Code. The Civil Service Reform Act is silent on the issue of who is to determine when a group of employees is in an other personnel system and what review is provided in the event there is an error in this determination. Employees in an other personnel system, deprived of rights provided under chapter 71 of Title 5, have no where else to turn but to the District Court for a legal ruling on their status. Congress clearly did not contemplate this situation and did not address it when passing the CSRA. Therefore, the federal question contained in the complaint was proper before the District Court.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 28, 1996

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED MAY 30, 1996

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-8475

(D. C. Docket No. CV 494-276)

FORT STEWART ASSOCIATION OF EDUCATORS,
Plaintiff-Appellant,

versus

JOSEPH A. WESTON, Arbitrator, et at.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(May 30, 1996)

Before Dubina and Black, Circuit Judges, and Marcus*, District Judge.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

---

*Honorable Stanley Marcus, U.S. District Judge for the Southern District of Florida, sitting by designation.

Entered: May 30, 1996
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davids

Deputy Clerk

ISSUED AS MANDATE: 7/9/96

APPENDIX B - OPINION OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF GEORGIA SAVANNAH DIVISION DATED FEBRUARY 24, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

FORT STEWART ASSOCIATION OF EDUCATORS, Plaintiff,	)	
vs.	)	No. CV 494-276
MR. JOSEPH A. WESTON, Arbitrator, and FORT STEWART DEPENDENTS SCHOOLS DEPARTMENT OF DEFENSE DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS, Defendant.	)	

ORDER AND MEMORANDUM

Before the Court is the federal defendants' motion to dismiss for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). For the reasons set forth below, defendants' motion is granted.

FACTS

Plaintiff Fort Stewart Association of Educators ("FSAE") is the exclusive bargaining representative for all professional and non-professional employees of defendants Fort Stewart Dependents Schools, Department of Defense Domestic Dependent and Elementary Schools ("FSDS"). FSAE negotiated a collective bargaining agreement with FSDS that included a

provision for resolving disputes through a grievance procedure and arbitration.

Judith Johnson was employed as a non-preference eligible excepted service ("NEES") employee pursuant to 20 U.S.C. §241 with FSDS in 1992. She worked as an art teacher at FSDS during 1992 and 1993. On August 25, 1993, she was removed from her teaching responsibilities and assigned to the copy room. On September 6, 1993, FSAE filed a grievance on Ms. Johnson's behalf concerning this reassignment. On September 27, 1993, FSDS issued a written notice of termination to Ms. Johnson effective September 29, 1993. FSAE filed a second grievance on Johnson's behalf contesting the termination. FSAE and FSDS failed to resolve the grievances through the grievance procedure and they submitted the disputes to arbitrator Joseph Weston.

Arbitrator Weston conducted an arbitration hearing on June 13 and 14, 1994. Joseph Weston issued his opinion denying the grievances on August 8, 1994. He denied the grievance on the ground that Johnson was not entitled to arbitration because she is a NEES employee of the government, employed pursuant to 20 U.S.C. §241. FSAE brought the current action seeking a declaratory judgement that the provisions of the collective bargaining agreement are enforceable and order directing arbitrator Weston to decide the dispute on the merits. Specifically, FSAE contends that Ms. Johnson was employed under an "other personnel system" as set out in 5 U.S.C. § 7121(e) and (f) and, therefore, entitled to arbitration of the disputes.

DISCUSSION

Plaintiff bases subject matter jurisdiction on 5 U.S.C. Chapter 71, 28 U.S.C. §1331 and 28 U.S.C. §1361. FSDS contends that the Court lacks subject matter jurisdiction because Johnson was not employed under an other personnel system, because Johnson is not entitled to the protection of the provisions listed in 20 U.S.C. §241(a), and because Johnson is a probationary NEES employee. Defendants further contend that jurisdiction is not proper pursuant to the mandamus provision, 28 U.S.C. §1361, because the statute is not an independent grant of subject matter jurisdiction and because the arbitrator is not an officer or employee of the United States.[1]

Plaintiff contends that the subject matter jurisdiction is appropriate in the district court because review is provided under general federal question jurisdiction or not at all. This assertion requires an examination of the statutory scheme set out in the Civil Service Reform Act of 1978 ("CSRA"), Pub.L. No. 95-454, 92 Stat 1111 (codified as amended in scattered sections

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[1] Defendants' argument that jurisdiction is inappropriate under Karahalios v. National Federation of Federal Employees, 489 U.S. 527 (1989) and related cases, is inapposite to the present dispute since it concerns unfair labor practices brought before the Federal Labor Relations Authority. This argument will not be addressed by the Court.

of 5 U.S.C.). The CSRA provides a detailed procedure for reviewing adverse personnel actions taken against federal employees. United States v. Fausto, 484 U.S. 439, 443 (1988). The CSRA divides employees into the three major categories of senior executive service, competitive service and eligible excepted service. Department of the Treasury v. Federal Labor Relations Authority, 873 F.2d 1467, 1468 (D.C.Cir. 1989). cert. denied, 493 U.S. 1055 and 493 U.S. 1056 (1990). Preference status is given to those eligible in the excepted service who are veterans or certain close relatives of veterans. 5 U.S.C. §2108 (1977 & Supp. 1994).

Chapter 71 of Title 5 provides for representation of federal employees by labor organizations. Section 7121 (1980) provides for resolution of employee disputes through a negotiated grievance procedure that includes questions of arbitrability. Section 7121(e)(1) provides that matters covered under §§4303 and 7512 which are part of a negotiated grievance procedure can either be resolved through the grievance procedure or brought in front of the Merit Systems Protection Board ("Board"). Section 4303 (1994) covers a reduction in grade or removal for unacceptable performance. Section 7512 (1980) covers major adverse actions taken against an employee, including removal. For employees employed pursuant to other personnel systems, actions similar to those outlined in §§4303 and 7512 can either be resolved through the negotiated grievance procedure or any applicable appellant procedures. The applicable appellant procedures are the agency's own personnel regulations. Nieuwdorp v. Library of

Congress, 872 F.2d 1000, 1002 (Fed.Cir. 1989).

Section 7121(f) provides that, if arbitration is pursued under §§4303 and 7512, judicial review is available through the United States Court of Appeals for the Federal Circuit in the same manner as if the dispute had been taken before the Board. For employees employed pursuant to an other personnel system, judicial review is available in the same manner as matters raised under applicable appellant procedures. Section 7122(a)(1980) provides for review of an arbitrator's award by the FLRA for matters other than the ones covered in §7121(f).

In this case, Johnson is not an employee for purposes of §7512. NEES employees employed less than 2 years in the same or a similar position, are not employees governed by Chapter 75 of the CSRA. 5 U.S.C. §7511(a)(1)(C)(Supp. 1994). Moreover, because Johnson was hired pursuant to 20 U.S.C. §241 (1994), certain sections of the CSRA, including §§4303 and 7512, are not applicable to her.[2] Therefore, if Johnson was employed under the main civil service system, she has no statutory right to arbitrate a dispute over her removal.

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[2] The Court recognizes that the language excluding personnel appointed under 20 U.S.C. §241 from certain protective provisions of the CSRA is not mandatory. Plaintiff has offered no evidence or argument that Ms. Johnson was given these protections, however, and the Court presumes that she was not. See Todd v. Department of Defense, 63 M.S.P.R. 4, 7 (1994).

Department of Treasury, 873 F.2d at 1469-72. If Johnson was a NEES employee employed pursuant to an other personnel system, then she may have been entitled to arbitration but she has no statutory right under the CSRA to judicial review of that decision. See id. at 1472 (stating that while NEES employees employed under other personnel systems may negotiate for grievance procedures they have no statutory right of appeal). Therefore, judicial review is not provided by the CSRA regardless of whether Johnson was employed with the main civil service system or under an other personnel system. Indeed, plaintiff has not contended that Johnson is entitled to review under the statutory provisions of the CSRA.

Plaintiff does contend that, because there is no indication of congressional intent to preclude judicial review, review must be had in the district court. Plaintiff cites no authority for this proposition, however. Indeed, this proposition was directly refuted by the Supreme Court in United States v. Fausto, 484 U.S. 439 (1988). In Fausto, the Court held that a NEES employee was precluded from seeking judicial review not provided for in the CSRA. In so doing, the Court held that the presumption of judicial review was overcome by the statutory scheme as a whole. Id. at 452. Likewise, in this case, because there is no judicial review for a NEES employee like Ms. Johnson provided for in the CSRA, there is no judicial review available. The Eleventh Circuit has also recognized that a NEES employee does not have a right to non-statutory judicial review and that the court lacks jurisdiction to decide such an action. Royals v. Tisch, 864 F.2d 1565 (11th Cir. 1989).

Accordingly, this Court lacks subject matter jurisdiction to review the decision of the arbitrator in this case.

CONCLUSION

IT IS HEREBY ORDERED that defendants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction be and is granted. The Clerk of Court is directed to close this case.

/s/ John Nangle

UNITED STATES DISTRICT JUDGE

Dated: February 24, 1995

Supreme Court, U.S.
FILED
FEB 7 1997
CLERK

(2)

No. 96-908

In the Supreme Court of the United States

OCTOBER TERM, 1996

FORT STEWART ASSOCIATION OF EDUCATORS,
PETITIONER

v.

JOSEPH A. WESTON AND
FORT STEWART DEPENDENT SCHOOLS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the district court properly dismissed petitioner's complaint seeking to compel arbitration of an employment dispute where neither the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, nor any other applicable statutory personnel scheme authorizes such district court review.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-908

FORT STEWART ASSOCIATION OF EDUCATORS,
PETITIONER

v.

JOSEPH A. WESTON AND
FORT STEWART DEPENDENT SCHOOLS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the judgment is noted at 87 F.3d 1330 (Table). The opinion of the district court (Pet. App. 3a-9a) is unreported.

JURISDICTION

The court of appeals entered its judgment on May 30, 1996. The petition for a writ of certiorari was filed on August 28, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified in various sections of 5 U.S.C.), established an integrated and comprehensive scheme of administrative and judicial review for federal employment disputes. The procedural remedies provided depend upon an employee's classification. Generally, the CSRA accords members of the competitive civil service and veterans and their close relatives more elaborate administrative and judicial review rights than employees in the "excepted service." See 5 U.S.C. 2102, 2103, 2108, 4303(e), 7511, 7513, 7703; see generally *United States* v. *Fausto*, 484 U.S. 439, 445-447 (1988).

Chapter 75 of the CSRA, 5 U.S.C. 7501 *et seq.*, governs adverse actions taken against federal employees. Subchapter II, 5 U.S.C. 7511-7514, addresses "major" adverse actions, such as removals. Subchapter II grants employees certain procedural rights, as well as a right to seek review of major adverse actions before the Merit Systems Protection Board and the Federal Circuit. 5 U.S.C. 7513, 7701, 7703. Nonpreference eligible members of the excepted service are not entitled to these procedural protections unless they have "completed 2 years of current continuous service." 5 U.S.C. 7511(a)(1)(C)(ii).

b. The Labor Management Relations chapter of the CSRA, 5 U.S.C. 7101 *et seq.*, gives federal employees the right to form unions and to negotiate collective bargaining agreements. Collective bargaining agreements must include negotiated grievance procedures, including binding arbitration. 5 U.S.C. 7121(a) and (b). Major adverse actions taken against employ-

ees within the CSRA must be subject either to grievance procedures or to the appellate procedures of 5 U.S.C. 7701 *et seq.*, which provide for review by the Merit Systems Protection Board. 5 U.S.C. 7121(e).

Adverse actions taken against employees covered by "other personnel systems" may be challenged "under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedures, but not both." 5 U.S.C. 7121(e).

c. In the Elementary and Secondary Education Act of 1965 (the Education Act), Pub. L. No. 89-10, Tit. I, §§ 2, 4(d)(2), 79 Stat. 27 (formerly codified at 20 U.S.C. 241), Congress authorized the establishment of federal schools for military dependents in areas where public education is inadequate. Congress repealed the Education Act on October 20, 1994. Pub. L. No. 103-382, Tit. III, § 331(b), 108 Stat. 3965.[1] The Education Act empowered the Secretary of Defense, in his discretion, to hire personnel "without regard to the Civil Service Act and rules." 20 U.S.C. 241(a)(2) (1988).

2. The Department of Defense Domestic and Elementary Schools (Department) is a component of the Department of Defense. In 1992, pursuant to the Education Act, the Department hired Judith Johnson as an art teacher at the Fort Stewart Dependent Schools. Pet. App. 4a. Her status was as a non-preference eligible, excepted service employee,

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[1] In 1994, Congress enacted a statute similar to the Education Act entitled the Domestic Dependent Elementary and Secondary Schools Act of 1994, Pub. L. No. 103-337, Div. A, Tit. III, § 351(a), 108 Stat. 2727. This Section also provides for free, comparable public education for military dependents. The language authorizing appointment of federal employees differs from the predecessor statute under which petitioner was appointed. See 10 U.S.C. 2164.

and her position was not within the competitive civil service. Gov't C.A. Br. 3. In September 1993, the Department terminated Johnson for cause because she had repeatedly failed her teacher certification test. *Ibid.*; Pet. App. 4a.

Petitioner is the certified bargaining representative for employees of the Fort Stewart Dependents Schools. Pet. App. 3a. Petitioner entered into a collective bargaining agreement with the Schools pursuant to the CSRA's Labor Management Relations chapter, 5 U.S.C. 7101 *et seq.* C.A. R.E. (Collective Bargaining Agreement at 20). Petitioner filed a grievance on behalf of Johnson challenging her termination. Pet. App. 4a. The arbitrator denied the grievance on the ground that Johnson was not entitled to arbitration. *Ibid.*

Petitioner filed suit seeking to compel arbitration. The district court dismissed for lack of jurisdiction. Pet. App. 9a. Because Johnson was not an "employee" within the meaning of Section 7511(a)(1)(C)(ii), the district court concluded that Johnson was not entitled to file a grievance or to invoke any statutory rights to arbitration under the CSRA. Pet. App. 7a-8a. The district court also held that the Education Act did not afford Johnson a statutory right to arbitrate her removal. *Id.* at 7a. Finally, the district court ruled that Johnson was not entitled to arbitration under Section 7121(e) because, even if she fell within an "other personnel system," the CSRA did not provide for judicial review of the arbitrator's decision.

The court of appeals summarily affirmed. Pet. App. 1a-2a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Furthermore, the statutory scheme under which Johnson was hired has been repealed, and the operative collective bargaining agreement is subject to renegotiation this year. Further review is therefore not warranted.

1. Petitioner contends (Pet. 12-16) that arbitration may be compelled because Johnson fell within an "other personnel system" rather than within the CSRA. The court of appeals correctly upheld the district court's decision that it lacked jurisdiction to compel arbitration for two reasons.

First, the Education Act did not create a distinct personnel system, within the meaning of 5 U.S.C. 7121(e). The Education Act gave general authority to the Department of Defense to provide comparable education for the dependents of service members; it did not establish a comprehensive framework for conditions of employment, hiring, pay, resolution of adverse personnel actions, or review procedures. See S. Rep. No. 969, 95th Cong., 2d Sess. 110 (1978); cf. *Nieuwdorp* v. *Library of Congress*, 872 F.2d 1000, 1002 (Fed. Cir. 1989) (Department of Defense Dependents Schools employees in Germany held not to be within an "other personnel system").[2]

Second, even assuming the Education Act created an "other personnel system," employees in "other personnel systems" may seek review of major adverse

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[2] Examples of such "other personnel systems" are the Veterans Administration Health Care Personnel system, 38 U.S.C. 7401 *et seq.*, and the Defense Department Overseas Teachers Pay and Personnel Practices Act, 20 U.S.C. 901 *et seq.*

actions only under either that personnel system's appellate procedures "if any" or the negotiated grievance procedure created by a collective bargaining agreement. 5 U.S.C. 7121(e). The Education Act created no right to arbitration and no "appellate procedures" authorizing review of adverse personnel actions in district court. *Department of the Treasury* v. *FLRA*, 873 F.2d 1467, 1472 (D.C. Cir. 1989) (other personnel system language of Section 7121(e) presumes that there may be no appellate procedures under a given personnel system), cert. denied, 493 U.S. 1055 (1990).

Furthermore, employees under "other personnel systems" who pursue relief under a negotiated grievance procedure, as Johnson did here, may only seek review of the arbitrator's decision under the "applicable appellate procedures," if any, established by the personnel system. 5 U.S.C. 7121(f). Because the Education Act does not authorize district court (or any federal court) review of arbitrator's decisions, the district court lacked jurisdiction over petitioner's complaint.

2. The CSRA also forecloses review of petitioner's claim. Only persons employed continuously for at least two years may invoke the CSRA's appellate procedures for reviewing major adverse actions. 5 U.S.C. 7511(a)(1)(C)(ii). Johnson had been employed for 13 months. Pet. App. 7a; Gov't C.A. Br. 3-4. Further, under the CSRA, review of an arbitrator's decision may be obtained only in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7121(f), 7703; see also *Rogers* v. *Department of Defense Dependents Schools*, 814 F.2d 1549 (Fed. Cir. 1987).

3. Petitioner claims (Pet. 15-18) that the existence of a collective bargaining agreement allows it to seek review of the arbitrator's decision under the Administrative Procedure Act, 5 U.S.C. 702, the general federal question jurisdiction provision, 28 U.S.C. 1331, and the mandamus statute, 28 U.S.C. 1361. Congress, however, has established "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). At the same time, Congress outlined the procedures for review of arbitrators' decisions available to persons under "other personnel systems." 5 U.S.C. 7121(e) and (f). Allowing petitioner additional review of its negotiated grievance procedure outside Congress's established framework would (i) invert the preferred position of competitive service and preference eligible employees, who cannot have their arbitrations reviewed in federal district court, 5 U.S.C. 7121(e) and (f), 7703; (ii) undercut Congress's effort to create a centralized and uniform body of law governing federal employment relations; and (iii) accord unionized employees special opportunities for review of their employment grievances, while denying such protection to similarly situated employees who are not covered by a collective bargaining agreement. *Fausto*, 484 U.S. at 449-451; *McAuliffe* v. *Rice*, 966 F.2d 979, 981 (5th Cir. 1992) (employee of nonappropriated fund instrumentality of the Air Force may not seek review of termination under the Administrative Procedure Act because this "would perversely allow them more safeguards than Congress granted more-protected classes of ordinary federal

civil servants"); *Department of the Treasury* v. *FLRA*, 873 F.2d at 1472 (Congress provided "equal substantive protections against discipline or discharge for all federal employees in the same classification," which should not vary depending upon unionized or non-unionized status); *Royals* v. *Tisch*, 864 F.2d 1565, 1567-1568 (11th Cir. 1989). The court of appeals' decision was thus in accord with this Court's precedent and the decisions of other circuits. Furthermore, because the Education Act has been repealed, resolution of this question does not present a matter of continuing importance. Accordingly, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1997